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DRAFT REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FIFTIETH SESSION

Rapporteur: Mr. Christopher John Robert Dugard

CHAPTER IX

RESERVATIONS TO TREATIES

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A. Introduction

1. The General Assembly, in its resolution 48/31 of 9 December 1993, endorsed the decision of the International Law Commission to include in its agenda the topic "The law and practice relating to reservations to treaties".

2. At its forty-sixth session, in 1994, the Commission appointed Mr. Alain Pellet Special Rapporteur for the topic.[1]

3. At its forty-seventh session, in 1995, the Commission received and discussed the first report of the Special Rapporteur.[2]

4. Following this discussion, the Special Rapporteur summarized the conclusions he had drawn from the Commission's consideration of the topic; they related to the title of the topic, which should now read: "Reservations to treaties"; the form the results of the study would take; the flexible way in which the Commission's work on the topic should be carried out; and the consensus in the Commission that there should be no change in the relevant provisions of the 1969, 1978 and 1986 Vienna Conventions.[3] In the view of the Commission, those conclusions constituted the results of the preliminary study requested by the General Assembly in resolutions 48/31 of 9 December 1993 and 49/51 of 9 December 1994.

5. In 1995, the Commission, in accordance with its earlier practice,[4] authorized the Special Rapporteur to prepare a detailed questionnaire on reservations to treaties, to ascertain the practice of, and problems encountered by, States and international organizations, particularly those which were depositaries of multilateral conventions. The questionnaire was sent to the addressees by the Secretariat. In its resolution 50/45 of 11 December 1995, the General Assembly took note of the Commission's conclusions, inviting it "to continue its work ... along the lines indicated in its report" and also inviting States to answer the questionnaire.[5]

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[1] Official Records of the General Assembly, Forty-ninth Session, Supplement No. 10 (A/49/10), para. 382.

[2] A/CN.4/470 and Corr.1.

[3] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10), para. 491.

[4] See Yearbook of the International Law Commission, 1995, vol. II (Part Two), para. 286.

[5] As at 30 June 1998, 32 States and 22 international organizations had answered the questionnaire.

6. At its forty-eighth session, the Commission had before it the Special Rapporteur's second report on the topic.[5] The Special Rapporteur had annexed to his report a draft resolution of the International Law Commission on reservations to multilateral normative treaties, including human rights treaties, which was addressed to the General Assembly for the purpose of drawing attention to and clarifying the legal aspects of the matter.[6] Owing to the lack of time, however, the Commission was unable to consider the report and the draft resolution, although some members had expressed their views on the report. Consequently, the Commission decided to defer the debate on the topic until the next year.

7. At its forty-ninth session, the Commission again had before it the second report of the Special Rapporteur on the topic.

8. Following the debate, the Commission adopted preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties.[7]

9. In its resolution 52/156 of 15 December 1997, the General Assembly took note of the Commission's preliminary conclusions and of its invitation to all treaty bodies set up by normative multilateral treaties that might wish to do so to provide, in writing, their comments and observations on the conclusions, while drawing the attention of Governments to the importance for the International Law Commission of having their views on the preliminary conclusions.

B. Consideration of the topic at the present session

10. At the present session, the Commission had before it the Special Rapporteur's third report on the topic, which mainly dealt with the definition of reservations (and of interpretative declarations) to treaties (A/CN.4/491 and Add.1-5). It considered this report at its 2541st, 2542nd, 2545th and 2548th meetings, held on 4, 5, 10 and 12 June, respectively.

1. Introduction by the Special Rapporteur of his third report

11. In introducing his third report, the Special Rapporteur recognized the delicate and difficult aspects of the topic from the point of view of legal technique. His report was divided into two chapters. The first was devoted to the earlier work of the Commission on the topic, and the second to the

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[5] A/CN.4/477 and Add.1.

[6] Official Records of the General Assembly, Fifty-first Session, Supplement No. 10 (A/51/10), para. 137.

[7] Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52/10), para. 157.

definition of reservations (and interpretative declarations) and to reservations (and interpretative declarations) to bilateral treaties.

(a) The earlier work of the Commission on the topic and reactions from States and organizations consulted

12. The Special Rapporteur referred to the Commission's previous work,[9] drawing attention to its two main decisions. First, in principle and subject to an unlikely "state of necessity", the Commission would not call into question the provisions of the Vienna Conventions on reservations to treaties and would simply try to fill the lacunae and, if possible, to remedy the ambiguities and clarify the obscurities in them. Secondly, the work would lead to the preparation of a Guide to Practice, a set of guidelines which would be grafted onto the existing provisions, filling the lacunae therein, and would, if necessary, be accompanied by model clauses relating to reservations which the Commission would, as appropriate, recommend to States and international organizations for inclusion in treaties they would conclude in future.

13. The Special Rapporteur discussed the action taken[10] on his second report[11] and on the principal reactions to the Commission's preliminary conclusions on reservations to normative multilateral treaties, including human rights treaties. He recalled that two schools of thought had emerged from the debates on the preliminary conclusions endorsed by the Commission, which had been adopted without a vote. On the one hand, a clear majority had felt that the Commission had already taken a big step forward in recognizing that the human rights treaty monitoring bodies were competent to comment upon and express recommendations with regard to the permissibility of reservations by States[12] and in calling upon States to cooperate with monitoring bodies and to give due consideration to their recommendations. On the other hand, a second group had urged the Commission to go further and recognize that monitoring bodies had the right to draw the consequences of their findings, following the example of the European Court of Human Rights (Belilos case).

14. The Special Rapporteur felt that the divergence of views paralleled the division of States in the Sixth Committee, but along different lines. About half the States that had given their views on that point had approved the preliminary conclusions, while the other half had expressed reservations on the ground that States alone were competent, not only to determine the consequences of the possible impermissibility of a reservation, but even to find a reservation to be impermissible. The Special Rapporteur was convinced that it was part of the Commission's role to suggest progressive alternative solutions

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[9] Official Records of the General Assembly, Fiftieth Session, Supplement No. 10 (A/50/10).

[10] A/CN.4/491, paras. 9-30.

[11] A/CN.4/477 and Add.1.

[12] See Official Records of the General Assembly, Fifty-second Session, Supplement No. 10 (A/52.10), para. 157, para. 5 of the preliminary conclusions.

to States, provided they corresponded to trends that were desirable and had already taken reasonable shape. He drew the Commission's attention, however, to the opposition shown by States to the breakthroughs being recommended by some of its members in respect of human rights monitoring bodies.

15. The Special Rapporteur also said that he had so far received a response only from the Chairperson of the Human Rights Committee, who had sent in some initial comments on paragraph 12 of the preliminary conclusions, pointing out in that regard that universal monitoring bodies played no less important a role than regional bodies in the process by which the relevant practices and rules were developed.[13]

16. However, the Special Rapporteur considered it premature to reopen the debate on the preliminary conclusions, which the Commission would have to consider again; it would do well to wait, on the one hand, for the comments from States[14] and human rights bodies which it had requested, even if that meant reiterating the request, and, on the other hand, until the consideration of the question of the permissibility of reservations and reactions to them had been completed.

17. The Special Rapporteur said he had been favourably impressed by the interest which States had shown in the Commission's work on reservations to treaties. That interest was illustrated not only by the large number of statements made in the Sixth Committee, but also by the work done on the topic by the Asian-African Legal Consultative Committee and the Council of Europe's Committee of Legal Advisers on Public International Law (CAHDI), which had established a group of specialists on reservations to international treaties.[15]

18. Another proof of such interest was the large number of replies received from States (32) and international organizations (22) to the questionnaire on the topic. While expressing the hope that an even larger number of States and international organizations would reply, the Special Rapporteur regretted the silence of the European Communities thus far, which were not only depositaries, but also parties to many multilateral treaties.

19. Chapter II of the report was comprised of two sections, the first dealing with the definition of reservations to treaties and of interpretative declarations, and the second being devoted to reservations and interpretative declarations to bilateral treaties. Owing to lack of time, the Special Rapporteur had been unable to deal with "alternatives to treaties", as he had originally planned.

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[13] A/CN.4/491, para. 16.

[14] Four States had answered the questionnaire thus far, namely, China, Liechtenstein, Morocco and Switzerland.

[15] A/CN.4/491, paras. 27-30.

(b) Definition of reservations to treaties and of interpretative declarations

20. The Special Rapporteur had taken as his starting point the definition of reservations in the three Vienna Conventions, of 1969, 1978 and 1986, and, to begin with, that contained in article 2, paragraph 1 (d) of the 1969 Convention on the Law of Treaties. Referring to the travaux préparatoires which had led to the adoption of that definition,[16] he made three comments:

(a) The definition of reservations had not given rise to lengthy discussion when the 1969 Vienna Convention was being drawn up;

(b) The contractual definition of reservations proposed by the first Special Rapporteur, James Brierly, whereby they were understood as offers to other contracting parties, had evolved into the idea of a unilateral statement;

(c) The definition of reservations had gradually become separate from that of interpretative declarations and reactions to such declarations. The last Special Rapporteur, Sir Humphrey Waldock, considered that interpretative declarations belonged in the chapter relating to interpretation.

21. The Special Rapporteur noted that the codification, in the next two Vienna Conventions, of the law of treaties concluded by international organizations and on State succession in respect of treaties had had implications for the definition of reservations itself (art. 2, para. 1 (d) of the 1986 Vienna Convention and art. 2, para. 1 (j) of the 1978 Convention).

22. The result of the various contributions had been that none of the three Vienna Conventions gave a comprehensive definition of reservations, and the Special Rapporteur had therefore drafted a composite text[17] combining all the contributions. The resulting definition, which he called the "Vienna definition", could be used at the beginning of chapter I of the Guide to Practice.

23. In discussing the background and elements of the definition, the Special Rapporteur recalled that it had been adopted without significant doctrinal or political debates[18] and that, in the three conventions, it had been placed under the heading "Use of terms" (rather than "Definitions"), to show clearly that the definitions contained therein were only "for the purposes of the present Convention". Nonetheless, State practice and judicial decisions had conformed that definition without worrying whether or not the Vienna Conventions were actually applicable in the situations in which States used the definition. Thus, States explicitly invoked it in their practice inter se, particularly when converting an interpretative declaration into a reservation or in their pleadings in contentious cases. As for judicial decisions, suffice it to recall, among others, the case concerning the Delimitation of the Continental

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[16] A/CN.4/491/Add.1, paras. 53-68.

[17] Ibid., para. 82.

[18] Ibid., para. 53.

Shelf between the United Kingdom of Great Britain and Northern Ireland and the French Republic (the Mer d'Iroise case) in 1977, the Temeltasch case before the European Commission of Human Rights in 1982 and the Inter-American Court of Human Rights in its 1983 opinion on restrictions on the death penalty.

24. The Special Rapporteur noted that contemporary doctrine was almost unanimously in favour of the Vienna definition, which had acquired its "letters of nobility" and was the obligatory starting point for any consideration of the definition of reservations, even though some writers still proposed their own definitions. Nonetheless, according to the Special Rapporteur, certain problems persisted, and hence the Commission could make a useful contribution by refining and supplementing the Vienna definition.

25. To that end, the Special Rapporteur pointed out that the Vienna definition contained three formal components: a unilateral statement; the moment when the State or international organization expressed its consent to be bound by the treaty; and its wording or designation. It must also contain a substantive element, namely, that the reservation was intended to exclude or to modify the legal effect of certain provisions of the treaty.

(i) Unilateral statement

26. A reservation did not necessarily have to have the formal nature of a unilateral statement. The first Special Rapporteur, James Brierly, had had a "contractual" (or "conventional") conception of reservations, believing that they represented an agreement among the parties whereby they limited the effects of the treaty in its application to one or more of them. That conception, which was incompatible with the Vienna regime, was subsequently discarded. Although the relevant articles were silent on the form that the statement must take, the Special Rapporteur felt that it had to be written, as expressly stated in article 23 of the 1969 and 1986 Conventions. However, he also warned against taking an unduly formalistic approach to the "unilateralism" of reservations, in respect of both similar reservations made by States with special ties of solidarity and reservations formulated jointly by several States.[19] It would therefore be useful to indicate in the Guide to Practice that such practices were not incompatible with the definition of reservations; that was the purpose of draft guideline 1.1.1.

(ii) Moment of formulation of a reservation

27. The Special Rapporteur drew attention to the fact that, in the Vienna definition, the long list of moments when reservations could be made was neither exhaustive nor rigorous. Even if there were elements that related more to the legal regime of reservations, the emphasis placed on the moment served to prevent the potential parties to a treaty from formulating reservations at any time at all, something that would create great insecurity in contractual relations. Nevertheless, it would be better to specify that the list in

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[19] For example, the States of the European Union, which make, if not reservations, at least interpretative declarations and joint objections.

article 2, paragraph 1 (d) was the same in spirit as that in article 11, and that was the purpose of draft guideline 1.1.2.

(iii) Reservations having territorial scope

28. In that context, the Special Rapporteur recalled that a reservation could also be made at the time of the notification that the application of a treaty extended to a territory, an action which, in itself, did not of course constitute a reservation. That practice had so far not given rise to any objections, a fact which had led him to formulate draft guideline 1.1.3. On the other hand, as could be seen from article 29 of the Vienna Convention, a statement by which a State purported to exclude the application of a treaty to a territory meant that it sought "to exclude or to modify" the legal effect which the treaty would normally have, and such a statement therefore constituted, according to the Special Rapporteur, a "true" reservation, rationae loci (draft guideline 1.1.8).

(iv) Wording or designation

29. The last formal component of the Vienna definition, related to the condemnation of "legal nominalism" reflected in the phrase "however phrased or named", was largely established in practice and should have a counterpart in interpretative declarations; however, it does not call for any particular draft guideline.

(v) Exclusion or modification of the legal effect of certain provisions of the treaty

30. The substantive element of the Vienna definition was "teleological" in nature (the reservation purported "to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization"). It presented technical and complex problems.

31. The first set of problems was created by the expression "certain provisions", in respect of which it had been proposed - wrongly, according to the Special Rapporteur - that the word "provisions" should be replaced by the word "obligations".[20] On the other hand, there were in practice "transverse" reservations which related not to any particular provision, but, for example, to the way the State or international organization which had formulated it intended to implement the treaty as a whole or which consisted of excluding certain categories of persons from the application of the treaty. That practice was reflected by draft guideline 1.1.4.

32. A second set of problems was raised by the objective pursued by the author of the reservation. The Special Rapporteur noted that it was that feature which distinguished reservations from interpretative declarations or reservations relating to non-recognition which, in reality, did not constitute reservations when their authors did not intend to produce any kind of effect on the treaty itself or to rule out the application of the treaty in their relations with the

[20] For example, P.-H. Imbert; see document A/CN.4/491/Add.2, paras. 72-88.

non-recognized party. On the contrary, a statement did constitute a genuine reservation when the author stated that it did not accept any contractual relation with the entity it did not recognize, because such an act then had a direct impact on the application of the treaty as between the two parties. That type of unilateral statement could be formulated when the non-recognized entity became a party to the treaty, i.e., after the expression by the author of its consent to be bound by it (draft guideline 1.1.7).

(vi) "To exclude or modify" - "extensive" reservations

33. The precise contours of the expression "extensive reservations" raised very sensitive problems and had led to doctrinal controversy.[21] More particularly, the Special Rapporteur wondered whether the expression could also cover an extension of the rights or obligations of the author, a point on which the doctrinal debate was rather obscure. In his view, if what was involved was a unilateral commitment by the formulating State to go beyond what the treaty imposed on it, such a commitment did not constitute a reservation within the meaning of the Vienna definition because its possible binding force was not based on the treaty. In fact, ratification, signature or accession were merely an opportunity for the State which made the statement to make a unilateral commitment and, if it was bound, it was only for the reasons put forward by the International Court of Justice in the 1974 Nuclear Tests case (draft guideline 1.1.5).

34. On the other hand, if a State or international organization sought, by means of a reservation, to limit the obligations imposed on it by the treaty and, as a corollary, to limit the rights which the other contracting parties derived from the treaty, its statement constituted a reservation. Although a State could not, by means of a reservation, impose on other parties to the treaty a new obligation in respect of the obligations of general international law, the reserving State could nevertheless, through its reservation, deny other parties to the treaty the rights which they had, not under general international law, but solely by virtue of the treaty. On the other hand, the State could not "legislate" and attempt by means of a reservation, to impose obligations on other States which did not stem from general international law (draft guideline 1.1.6).

In conclusion, the Special Rapporteur proposed that the Commission might refer the eight draft guidelines of the Guide to Practice to the Drafting Committee.

2. Summary of the debate

See document A/CN.4/L.562/Add.1.

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[21] A/CN.4/492/Add.1, paras. 72-88.

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CHAPTER IX

RESERVATIONS TO TREATIES

Paragraph 10

Insert the following text at the end of the paragraph:

The Commission decided to transmit draft guidelines 1.1 (Definition of reservations), 1.1.1 (Joint formulation of a reservation), 1.1.2 (Moment when a reservation is formulated), 1.1.3 (Reservations formulated when notifying territorial application), 1.1.4 (Object of reservations), 1.1.5 (Statements designed to increase the obligations of their author), 1.1.6 (Statements designed to limit the obligations of their author), 1.1.7 (Reservations relating to non-recognition), 1.1.8 (Reservations having territorial scope), 1.2 (Definition of interpretative declarations) and 1.4 (Scope of definitions) to the Drafting Committee.

At its 2558th meeting, held on 7 August 1998, the Commission considered and adopted draft guidelines 1.1 (Definition of reservations), 1.1.1 [1.1.4] (Object of reservations), 1.1.2 (Cases in which a reservation may be formulated), 1.1.3 [1.1.8] (Reservations having territorial scope), 1.1.4 [1.1.3] (Reservations formulated when notifying territorial application), 1.1.7 [1.1.1] (Joint formulation of a reservation) and a draft guideline with no title or number concerning the relation between the definition and the permissibility of reservations. The text of these draft guidelines and of the commentaries relating thereto is reproduced in section C below.

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